Supreme Court, U.S.
FILED
MAR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1531

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ARLENE CRUZ,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTIONS PRESENTED

1. Where defendant asserts that she was denied effective assistance of counsel at the hearing on motion to suppress her statement, is the State Appellate Court's holding under Strickland that it need not consider the question of performance because prejudice was not proven, in that contrasting the medical testimony on the nature of the injury with the defendant's testimony as to how the child was injured, the trial court "would have found defendant's [trial] testimony incredible even without the admission of the confession into evidence" contrary to this Court's holding in Harrison v. United States, 392 U.S. 219, 20 L.Ed.2d 1047, where Harrison holds that testimony compelled in response to a confession admitted in violation of defendant's constitutional rights cannot be used against a defendant?

2. Was defendant denied her due process right to present relevant testimony, when, at hearing on defendant's motion to suppress her statement on the basis that it was coerced by threat, the court excluded the testimony of a person arrested with her and held as a suspect, to the effect that he was mistreated by the same officers in the same fashion as defendant asserted that she was mistreated?

PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Arlene Cruz, was the defendant in the Circuit Court of Cook County, Illinois, appellant in the Appellate Court of Illinois, and petitioner in Petition for Leave to Appeal filed in the Supreme Court of Illinois. Respondent, People of the State of Illinois, was plaintiff in the Circuit Court of Cook County, Illinois, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

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1. Where defendant asserts that she was denied effective assistance of counsel at the hearing on motion to suppress her statement, the State Appellate Court's holding under Strickland that it need not consider the question of performance because prejudice was not proven, in that contrasting the medical testimony on the nature of the injury with the defendant's testimony as to how the child was injured, the trial court "would have

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found defendant's [trial] testimony incredible even without the admission of the confession into evidence is contrary to this Court's holding in Harrison v. United States, 392 U.S. 219, 20 L.Ed.2d 1047. Harrison holds that testimony compelled in response to a confession admitted in violation of defendant's constitutional rights cannot be used against a defendant. 18

2. Defendant was denied her due process right to present relevant testimony, when, at hearing on defendant's motion to suppress her statement on the basis that it was coerced by threat, the court excluded the testimony of a person arrested with her and held as a suspect, to the effect that he was mistreated by the same officers in the same fashion as defendant asserted that she was mistreated. 23

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SUPREME COURT OF THE UNITED STATES

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No.

ARLENE CRUZ,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner, Arlene Cruz (hereafter, defendant), prays that a writ of certiorari issue to review the denial by the Supreme Court of Illinois of Petition for Leave to Appeal from the decision of the Illinois Appellate Court, First

District, affirming her conviction and sentence for aggravated battery of a child, in violation of Ill. Rev. Stat. 1985, Ch. 38, para. 12-4.3(a).

Judgment, Opinion and Order Below

The Order of the Illinois Supreme Court denying Petition for Leave to Appeal is set out as Appendix A. The Order of the Appellate Court of Illinois, First Judicial District, Disposing of the Appeal under Illinois Supreme Court Rule 23, is set out as Appendix B. The Order of the Appellate Court of Illinois, First Judicial District, denying Petition for Rehearing is set out as Appendix C.

Jurisdictional Statement

On April 9, 1987, the Illinois Appellate Court, First Judicial District, filed its Order Disposing of Appeal under Illinois Supreme Court Rule 23 otherwise unreported, set out in Appendix B. Petition for Rehearing was denied August 24, 1987. Defendant's Petition for Leave to Appeal was denied by the Illinois Supreme Court on December 22, 1987. Jurisdiction is invoked under 28 U.S.C. 1257(3) and Rules 20.1 and 29 of this Court.

Constitutional Provisions

AMENDMENT [V.]

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

AMENDMENT [VI]

In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defence.

AMENDMENT [XIV]

Section 1. ... [N]or shall any State deprive any person of liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of the Case

Petitioner, Arlene Cruz, was found guilty of aggravated battery, and sentenced to the Illinois Department of Corrections for a period of three years. At trial, defendant moved to suppress her statement, asserting it was obtained by police coercion. The trial court refused admission of testimony of her fiance, arrested with her, of coercive threats made to him as a means to force a statement from defendant. On appeal, defendant asserted she had been denied due process by the exclusion of the fiance's testimony and that she had been denied effective assistance of counsel at the hearing on the motion to suppress.

The Illinois Appellate Court held, based on defendant's trial court testimony, that there had been no prejudice to defendant at the motion to suppress, because she would have been convicted at trial based upon unbelievable trial court testimony. (App. 17) In Petition for Rehearing, defendant asserted the Appellate Court ruling violated this Court's holding in Harrison v. United States, 392 U.S. 219, 20 L.Ed.2d 1047 (1968). The Petition was denied without opinion. The violation of Harrison was raised in a Petition for Leave to Appeal to the Illinois Supreme Court. The Petition was denied without an opinion. Raised also in the Appellate Court and the Petition for Leave to Appeal was that due process was denied by excluding relevant testimony. The

Appellate Court rejected this position.

(App. 8-9)

STATEMENT OF FACTS

On September 9, 1984, defendant's two-year-old son, Edwin Geliga, was brought to the emergency room of Children's Memorial Hospital by the defendant. The child was pale, moaning softly, and had a very large ecchymosis over the right side of his chest. At that time, defendant was residing at 4275 N. Spaulding. (R. 153) However, since she had just moved, the address on the green card (Public Aid Identification Card) provided to the hospital was 2846 N. Woodard (R. 154), the address where she had been living at the time that the card was obtained. The young lady she spoke to at the hospital took her green card and obtained from that card the information concerning her address. (R. 159)

Her son was hospitalized. She stayed with him all that day (Sunday) and Sunday night until Monday morning at 3:00 a.m. (R. 160) She then left and went to work. She had to be at work at 6:30 a.m. Fernando, her fiance, took the day off and stayed with Joey, one of her other children. (R. 160) She called the hospital at various times. At approximately 12:00 noon, she communicated with the hospital and they told her that her son was being transferred to a regular room. Before going to the hospital, she stopped at the store to pick up some little animals. She was with her fiance and her two other children (R. 160) when the police came to her and told her that they were going to take her to the station. (R. 161) On the way to the police station, they

stopped because she had to go to the ladies room. (R. 162) She was told by the police that she was going to be put in one room, her fiance in another and the children would just sit outside. (R. 162) She told the police that they had to be careful not to excite her child, Leticia, because she had a heart problem and Dr. Colfrin at Children's Memorial Hospital said she should not get excited. (R. 162)

It was about 5:00 or 5:30 a.m. when they got to the police station. (R. 163) About 9:30 p.m., Det. Schak came in, kept demanding that defendant tell him what she did to her son, and she kept insisting that she did not do anything. (R. 163-164) At trial,[1] she testified:

---

1. She was not called as a witness at the motion to suppress.

"A: And so he got real, real close to me and I thought he was going to hit me and so he kept pushing and walking towards me and so when I was walking he had pushed me, like, you know, to the -- near, like that, and he kept telling me, he says 'In about four minutes I'm going to drive you crazy because ...' and he could have done it, because I was already upset, and he kept using words like, 'Goddamnit, lady, give me a statement.' and I told him, 'I didn't do it, and I was not going to give him a statement.'

And he told me, 'If you don't give me a statement I'm going to take Joe and Leticia and put them in a foster home.'" (R. 164-165)

"And Joey was sitting on my lap, and he told Joey, and I said, 'I feel like I'm going to go crazy,' and so he said, Joey said to me, 'Mom, if you give them a statement we can all go home and you can go to the doctor.'

Q: What happened next, if anything?

A: So I told him, 'Okay, I'll give you a statement.' And I said, 'But you've got to put my kids with my mother,' and I

> said, 'You got to put my kid with my mother's house,' and he said, 'No.'
>
> Q: So you gave him a statement?
>
> A: Yes. But it was so late at night because I kept falling asleep, and he told me, 'I'm going down to eat and after I come back I'll take your statement from you.'" (R. 166)

She ultimately agreed to give a statement because:

> "He promised to put my kids in a foster home if I did not sign the statement for him. He said he was going to put them there and he kept telling me this was the only way that he was going to let everybody go home." (R. 168-169)

At the motion to suppress, her fiance, Fernando Lebron, testified how he, the defendant and the children were taken to the police station, that he was put in a room (R. 86), that they kept questioning Arlene, that finally Det. Schak took him and Joey, the defendant's ten year old

(R. 88) and put them in a little room and they left the younger child outside playing by herself. (R. 88) He testified:

> "They came to me, and they started questioning me. And he tells me when I was ready to talk, he told me to shut up. He wanted me to talk, but he didn't want me to talk on the same time, because he told me to shut up. So you know, he was questioning me about what happened to the baby, so I explained to him what happened to the baby, and then I -- the night he fell, and he didn't believe me, so he walked out." (R. 89)

The court excluded his testimony concerning how the detective had treated him. In an offer of proof the witness testified:

> "Q: Did Detective Schak say anything to you regarding what was going on with Arlene?
>
> A: He came into the room and he told me that if I told him that Arlene did hit the baby, it was going to -- he was going to let

> the kids go, let Arlene go, and he was going to send her to a doctor." (R. 91)

Officer Strzechowski testified that about 2:30 or 3:00 in the afternoon of September 10, 1984, he went looking for the mother of Edwin Geliga and found her in front of her home at 4257 N. Spaulding. He advised her that he would like her to come to the station, that they were conducting an investigation concerning her son, that she was put in the back of the police vehicle with her boyfriend and her two other children, that she was given her Miranda warnings. (R. 7) The officer denied that at any time he or anyone in his presence slapped her or pushed her against any wall (R. 9), or that he ever threatened to take her children away from her if she did not talk.

Richard A. Schak, a Detective assigned to Area 5 Violent Crimes, testified that at 9:30 p.m. he became involved in the investigation of the injuries of Edwin Galetka, that he also talked to Miss Cruz (R. 20) and advised her of her constitutional rights. He denied that he ever told her that if she did not make a statement, her children would be taken away from her. (R. 21) Her two young children and her fiance were also present at the police station. (R. 29) Schak denied telling Miss Cruz that if she did not give a statement, he would also charge her fiance. (R. 33)

Officer Walter King, a youth officer (R. 38), testified essentially the same as Officer Strzechowski concerning giving warnings to the defendant. He testified as follows concerning the minor children

being taken to the police station:

"Q: Isn't it true at that time that Miss Cruz asked you if you could bring her kids to a relative, instead of taking them to a police station?

A: We had conducted the investigation, allegation of child abuse. We had to conduct of investigation. There were three kids in her custody. We had to make sure that these other children weren't being abused." (R. 50-51)

"Q: Well, isn't it true that at the police station when you spoke with Miss Cruz, that she asked if the children could go home with her fiance?

A: I told Miss Cruz that her fiance was under investigation too.

Q: Well, isn't it true that she asked you if she could call her mother so that the kids could be picked up and not have to spend the evening at the police station?

A: I don't know why she would ask me that, because I talked to her mother and her mother had no phone." (R. 52-53)

He and his partner were involved with defendant from the time she was arrested around 5:00 until around 9:30 in the evening when Detective Schak and his partner became involved. (R. 55)

Georgia Buglass, Assistant State's Attorney, testified that at 1:15 a.m. on September 11, 1984, she arrived at the police station. (R. 69-70) She saw the defendant, gave Miranda warnings and took a statement. She was told that defendant had already given a statement to the police.

Private counsel moved to suppress. He failed to assert that there was no probable cause to arrest defendant; he did not interview her before the hearings; he failed to call her as a witness at the motion to suppress.

REASONS FOR GRANTING CERTIORARI

1.

Where defendant asserts that she was denied effective assistance of counsel at the hearing on motion to suppress her statement, the State Appellate Court's holding under Strickland that it need not consider the question of performance because prejudice was not proven, in that contrasting the medical testimony on the nature of the injury with the defendant's testimony as to how the child was injured, the trial court "would have found defendant's [trial] testimony incredible even without the admission of the confession into evidence"[2] is contrary to this Court's holding in Harrison v. United States, 392 U.S. 219, 20 L.Ed.2d 1047. Harrison holds that testimony compelled in response to a confession admitted in violation of

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2. The court further stated:

"Thus, we need not determine whether but for either the alleged errors of trial counsel the confession probably would have been suppressed. Nor are we required to consider the performance prong of the Strickland test. Defendant has failed to establish that she was prejudice by the actions of counsel she claimed incompetent."

defendant's constitutional rights cannot be used against a defendant.

Defendant on appeal asserted: (1) that without the confession, the State had insufficient evidence;[3] and (2) that she was denied effective assistance of counsel at the hearing on the motion to suppress her confession.

The Appellate Court held it need not resolve whether defendant's performance was deficient, because the trial court would have convicted her based upon his disbelieving her trial court testimony as to how injury occurred to the child. In a Petition for Rehearing, it was asserted that since she testified in order to

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3. The evidence other than defendant's confession and trial testimony, that her child was seriously injured while living with her, her boyfriend and other children, would have been insufficient to sustain a conviction.

counter her confession, the Appellate Court's ruling violated this Court's opinion in Harrison v. United States, supra.

Petition for Rehearing was denied, as was a Petition for Leave to Appeal to the Illinois Supreme Court.

The error of the State Appellate Court is that its holding is in conflict with Harrison v. United States, 392 U.S. 219, 20 L.Ed.2d 1047 (1968).

Where defendant takes the stand and testifies in order to counteract the statement that was illegally obtained, the court cannot resolve any errors with regard to the admission of the statement by asserting that the testimony thus given was itself incredible. As the Seventh Circuit Court of Appeals noted in United States ex rel. Williams v. Twomey,

467 F.2d 1248, 1253 (1972), Harrison is binding upon state courts to prevent the use of trial testimony given after illegal admission of defendant statements in evidence. In Randall v. Estelle, 492 F.2d 118 (1974), the Fifth Circuit likewise affirmed the Harrison principle, proscribing the use of incriminating testimony which was impelled by the admission of a bad prior confession. Moreover, the United States Supreme Court has recently affirmed that Harrison precludes use of testimony compelled by the introduction of an inadmissible confession at trial. Oregon v. Elstad, 470 U.S. 298, 84 L.Ed.2d 222 (1985).

Here, if her statement had not been admitted, defendant would not have testified--there was no other need for her testimony and hence neither the trial

court nor the reviewing court would be able to assert that her trial testimony was incredible concerning the occurrence.

Certiorari should be granted so this Court can decide whether, in determining if counsel rendered ineffective assistance, a court may find there is no need to evaluate the performance prong because the defendant had failed to prove the prejudice prong by relying upon testimony that was given solely in response to the evidence which would have been suppressed if counsel had not been ineffective.

2.

Defendant was denied her due process right to present relevant testimony, when, at hearing on defendant's motion to suppress her statement on the basis that it was coerced by threat, the court excluded the testimony of a person arrested with her and held as a suspect, to the effect that he was mistreated by the same officers in the same fashion as defendant asserted that she was mistreated.

In her motion to suppress, the defendant asserted that the statements obtained from her were involuntary because of police threats that if she did not give a statement admitting beating her child, her other children, who were at the police station with her, would be taken away and that her fiance, who was brought to the police station with her, would also be arrested. (R. 292)

She offered testimony of her fiance, who was arrested with her, that during his interrogation the police subjected

him to the improper pressure. She offered that he was told by the police officers that if defendant did not make a statement her children would be taken from her;[4] that if he told them that Arlene did hit the baby, the officer would let the kids go and that she, the defendant, could go to a doctor. (R. 91) The trial court excluded this testimony as irrelevant. The Appellate Court upheld such exclusion. (Appendix B) This exclusion denied due process.

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4. Action of the police designed to coerce a confession, including a threat to keep others in custody for the mere purpose of exerting pressure upon the suspect is unconstitutional, especially where those others are close family members, such as a spouse or a child. Lynumn v. Illinois, 372 U.S. 528, 9 L.Ed.2d 922; People v. Trout, 54 Cal.2d 576, 354 P.2d 231, 80 ALR 2d 1418; United States v. Tingle, 658 F.2d 1332 (9 Cir. 1981).

The due process clause of the Fifth Amendment is violated when a defendant is prevented from presenting highly relevant evidence. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297. Relevant to whether improper pressure was applied upon defendant is whether the same police officers who arrested defendant and her boyfriend and interrogated them both in separate rooms maltreated her boyfriend in the same manner that she asserted she was maltreated. It was evidence of the "crucial element of police overreaching ..." of coercive police conduct. Colorado v. Connelly, 479 U.S. ___, 107 S.Ct. 515, 93 L.Ed.2d 473, at 482. Just as common design and/or common scheme testimony is admissible against defendant, common coercive police conduct testimony must also be admissible.

Evidence that in one investigation officers make the same threat to another suspect is relevant to whether the same improper threats were made to defendant. The exclusion of this highly relevant evidence on the basis that it is irrelevant denies due process.

This Court should grant certiorari to consider this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

App. 1

ILLINOIS SUPREME COURT
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65873

December 22, 1987

Mr. Frederick F. Cohn
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No. 65873 - People State of Illinois, respondent, v. Arlene Cruz, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on January 13, 1988.

FOURTH DIVISION
FILED: 4/9/87.

NOTICE
The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

85-2193

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee,	) Appeal from the) Circuit Court of) Cook County.
vs.	) Honorable) Roger Kiley, Jr.
ARLENE CRUZ, Defendant-Appellant.	) Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

After a bench trial, defendant, Arlene Cruz, was found guilty of aggravated battery of a child (Ill. Rev. Stat. 1985, ch. 38, par. 12-4.3(a)) and sentenced to 3 years in the Illinois Department of

Corrections. On appeal, defendant raises three issues: (1) whether the trial court committed reversible error by excluding as irrelevant part of the testimony of defendant's fiancee at the hearing on the motion to suppress; (2) whether defendant was denied effective assistance of counsel; and (3) whether the trial court's ruling at the suppression hearing was manifestly erroneous and whether defendant's post-arrest statement should have been excluded as fruits of an illegal arrest.

At trial, the evidence established that on September 9, 1984, defendant brought her 2-year-old son, Edwin Geligo, Jr., to the emergency room of Children's Memorial Hospital. Dr. Todd Davis, the emergency room treating physician,

testified that the child's condition was life-threatening, his liver was enlarged and palpable, and he had a very large ecchymosis (bruise) over the right side of his chest and back. Tests revealed a blood clot in the child's liver, a bruise on the right kidney, and multiple-healing fractured ribs on both the right and left sides from past untreated injuries. The next evening, suspecting child abuse, police officers picked up defendant for questioning. She was interrogated through the night by two teams of officers. At approximately 1 a.m., an Assistant State's Attorney was summoned and defendant made a statement, confessing to the abuse of her son.

Defendant moved to suppress her confession, claiming that the confession

was coerced. After a hearing, the court denied the motion. The case proceeded to a bench trial at which defendant testified that her son's injuries resulted from falling out of the bed and that the child had been actively playing after the fall. She also testified that her confession was untrue and elicited by threats from the police officers that if she did not make a statement her children would be taken from her. Defendant further stated that the confession was effectuated by her merely answering "yes" to a series of questions posed by the interrogating officer. The court found defendant guilty, specifying that it did not believe her testimony, and sentenced her to 3 years' imprisonment. Defendant appeals.

I.

Hearing on the Motion to Suppress

At the hearing on the motion to suppress, the prosecution presented, as witnesses, the four interrogating police officers and the Assistant State's Attorney who took defendant's statement. The only defense witness was defendant's fiancee (defendant did not testify at the hearing), who had been picked up for questioning along with defendant. He attempted to offer testimony that he was told by police officers that if defendant did not make a statement her children would be taken from her. After objection, the court ruled the evidence irrelevant and the testimony was entered into the record on an offer of proof.

Defendant contends that the court's exclusion of that testimony as irrelevant was erroneous. She asserts that her witness' testimony would have corroborated her claim of coercion by establishing a pattern and practice within the police department of using threats to get confessions. This type of testimonial evidence, modus operandi, is an established admissible form of evidence in criminal cases when offered against a defendant. (See People v. McDonald (1975), 62 Ill.2d 448, 455, 343 N.E.2d 489, 492-93; People v. Tranowski (1960), 20 Ill.2d 11, 16, 169 N.E.2d 347, 349.) Here, however, defendant wishes to introduce evidence of modus operandi against a witness. She argues that the action of the police either "rises to the

level of a crime or is sufficiently analogous to a crime" to warrant the admission of evidence of other offenses.

Defendant cites Lynumn v. Illinois (1963), 372 U.S. 528, 9 L.Ed.2d 922, 83 S.Ct. 917, for the proposition that actions of the police, designed to coerce a confession, which includes threats to keep family members in custody for whom there is no probable cause to arrest, is unconstitutional. We do not dispute that such actions by police officers are unconstitutional. However, that is not the issue before us. Here, we are concerned specifically with whether evidence of other conduct by a witness is admissible as modus operandi to impeach that witness' testimony and to

corroborate the testimony of the defendant.

This court considered precisely the same issue in People v. Byer (1979), 75 Ill.App.3d 658, 394 N.E.2d 632. In Byer, the issue at the suppression hearing was whether defendant's statement to the police was coerced and, therefore, involuntary. The defense witness attempted to testify that during questioning the police told her that unless she cooperated with them her children would be taken away from her. Defense wanted to use this testimony to impeach that of a police officer and corroborate defendant's testimony by establishing a modus operandi of coercion by the police. This court affirmed the trial court's exclusion of the testimony,

ruling as follows:

> "The issue at the suppression hearing was whether the defendant's statement to the police was involuntary. The treatment [another] received at the police station, even if identical to that allegedly received by the defendant was not relevant to the issue under consideration. Cases concerning the admissibility of other crimes from which a course of conduct may be inferred are not analogous. We thus reject this argument." 75 Ill.App.3d 658, 671, 394 N.E.2d 632, 641.

Finding no distinction between our ruling in Byer and the instant case, we hold that the trial court properly excluded that part of defense witness' testimony which referred to other acts as irrelevant to the issue at the suppression hearing.

II.

Ineffective Assistance of Counsel

Defendant's second contention is that she was denied her right to effective assistance of counsel pursuant to the sixth amendment to the U.S. Constitution. She bases this claim on trial counsel's failure to (1) call her as a witness at the hearing on the motion to suppress and (2) move to quash her arrest and to suppress her statement as a product of an illegal arrest.

The United States Supreme Court in Strickland v. Washington (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052, enunciated a two-prong requirement a defendant must satisfy to prevail on a sixth amendment claim of ineffective assistance of counsel. The Illinois Supreme Court adopted this test in People v. Albanese (1984), 104 Ill.2d 504, 525-27, 473 N.E.2d 1246, 1255-56. Under this test "the constitutionally guaranteed assistance of counsel has not been provided if the defendant can prove that counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to 'deprive the defendant of a fair trial, a trial whose result is reliable. [Citation.]'" (104 Ill.2d

504, 525, 473 N.E.2d 1246, 1255.) In summary, the first-prong tests whether counsel's performance was deficient and the second-prong examines the prejudice suffered by the defendant.

As a practical matter, "'[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [Citation.]'" (104 Ill.2d 504, 527, 473 N.E.2d 1246, 1256.) In order for a defendant to prevail on the prejudicial prong he must establish that, were it not for counsel's

unprofessional errors, there is a reasonable probability that the result of the proceedings would have been different. 104 Ill.2d 504, 525, 473 N.E.2d 1246, 1255.

Thus, here we must determine whether it is reasonably probable that had trial counsel (1) called defendant as a witness at the suppression hearing, or (2) moved to suppress her statement as "fruits" of an illegal arrest, her confession would have been suppressed and her trial would have resulted in an acquittal. Therefore, our inquiry begins with the determination of whether defendant would probably have been acquitted if either of the claimed incompetencies had resulted in the suppression of her confession. Only if we find that defendant would have

been acquitted without the admission of the confession must we then determine if either of the claimed incompetent actions would have resulted in the suppression.

The evidence presented at trial, excluding the confession would consist primarily of the testimonies of the defendant herself and Dr. Davis, the treating physician. Dr. Davis testified that Edward was brought into the emergency room of Children's Memorial Hospital around 9 p.m. on September 9 in a state of impending shock. Edwin's injuries included a bruise so large that it extended from just below the nipple line of his chest down to his pelvis, from the front of his chest, about the midline of the abdomen, around to his back near the spinal column. Tests

revealed a blood clot in the liver, a bruise of the right kidney, and multiple-healing broken ribs on both the right and left sides from a prior untreated injury. When Edwin was first brought in, the hospital activated its multiple trauma team and the child had to be taken to the intensive care unit. Dr. Davis further testified that Edwin's condition was life-threatening. Defendant testified that she first noticed the bruise on her 2-year-old son, Edwin, around 9 a.m. on September 9; that the bruise was a result of Edwin's having fallen out of the bed; and that during that day he actively played with the other children. When questioned about the prior injury to Edwin evidenced by the broken ribs, she testified that he

had fallen through a back porch but that she had not sought medical treatment for him because he was not hurt. Given the discrepancies in these testimonies it is reasonably probable that the trial judge would have found defendant's testimony incredible even without the admission of the confession into evidence. Thus, we need not determine whether but for either of the alleged errors by trial counsel the confession would have probably been suppressed. Nor are we required to consider the performance prong of the Strickland test. Defendant has failed to establish that she was prejudiced by the actions of counsel she claimed incompetent.

At oral argument, defendant directed us to the recently decided case of United States ex rel. Cross v. Derobertis, No. 86-2844 (7th Cir. January 28, 1987), in which the United States Court of Appeals for the Seventh Circuit reversed and remanded on the issue of ineffective assistance of counsel. Analogizing it to the instant case, defendant seeks the same result. In Derobertis, defendant's trial counsel failed to investigate and produce protential witnesses. In applying the second-prong of the Strickland test, the court found it "especially important * * * that the district court have the opportunity to assess comprehensively the proposed testimony of the missing witnesses" (slip op. at 17), and accordingly held the

record insufficiently developed to allow for examination of the error's prejudicial effect. This is inapposite to the instant case.

Here, the complained of missing testimony was that of the defendant at the suppression hearing. It is clear that the suppression hearing is not the only opportunity for a defendant to challenge his confession. Where the trial court, as here, rules that a confession is voluntary and admits it into evidence, the defendant maintains the right to challenge its credibility and weight at trial. (People v. Monroe (1981), 95 Ill.App.3d 807, 814, 420 N.E.2d 544, 549.) Defendant here exercised that right. The judge, at the bench trial, heard and considered

defendant's explanation of her son's injuries and the circumstances of her confession. He found her testimony incredible. Derobertis is distinguishable from the instant case because here the trial court did not have to speculate as to the effect of any missing testimony. Thus, we reject this argument.

III.

Fruits of the Poisonous Tree

Defendant's third issue on appeal is whether the admission of her confession into evidence violated her fourth and fifth amendment rights. Arguing, first, that no probable cause existed for her arrest, she contends that her confession should have been suppressed as the "fruit" of an illegal arrest. Defendant

raises this argument for the first time on appeal. Illinois courts have consistently held that a motion to quash arrest must be raised before or during trial or it is waived for purposes of appeal. (In re Lamb (1975), 61 Ill.2d 383, 387, 336 N.E.2d 753, 755-56, cert. denied (1976), 425 U.S. 938, 48 L.Ed.2d 180, 96 S.Ct. 1672; People v. Watkins (1981), 98 Ill.App.3d 889, 897, 424 N.E.2d 701, 706-07; People v. Grice (1978), 58 Ill.App.3d 264, 267-68, 374 N.E.2d 239, 241.) Defendant did not argue that the arrest was illegal in her motion to suppress or at trial and, thus, has waived that issue here. Furthermore, where the question of the legality of defendant's arrest does not appear in the record, this court is not justified in

considering the matter on appeal under the doctrine of plain error since plain error cannot be predicated on a void in the record. 58 Ill.App.3d 264, 268, 374 N.E.2d 239, 241.

Lastly, defendant argues that her statement was coerced and, therefore, involuntary. This allegation has already been litigated at the suppression hearing. "A trial court's ruling on a motion to suppress will not be set aside unless the ruling is manifestly erroneous." (Pepole v. Skozen (1986), 142 Ill.App.3d 515, 524, 491 N.E.2d 1352, 1358.) The record reveals that the preponderance of the evidence presented at the suppression hearing established that defendant's statement was voluntary. Therefore, the trial court's

finding was clearly supported by the manifest weight of the evidence.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Dated this 9th day of April, 1987.

McMORROW, P.J., JOHNSON, and JIGANTI, JJ.

IN THE APPELLATE COURT,
STATE OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee,	)	
v.	)	No. 85-2193
ARLENE CRUZ, Defendant-Appellant.	)	

ORDER

This cause coming on to be heard on Petition For Rehearing, and the Court now being fully advised in the premises:

IT IS ORDERED that said Petition For Rehearing be and the same is hereby denied.

DATED: August 24, 1987

_____
Justice

_____
Justice

_____
Justice